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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1299

EDNA MAE BOOKER,
Petitioner,

vs.

THE STATE OF KANSAS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT C. LONDERHOLM,
Attorney General of Kansas,
State House,
Topeka, Kansas,
KEITH SANBORN,
County Attorney,
Court House,
Wichita, Kansas,
Attorneys for Respondent.

DONALD FOSTER,
Deputy County Attorney,
Court House,
Wichita, Kansas,
Of Counsel.

R. L. MERSEREAU, Inc., 920 Cherry Street, Kansas City, Mo. 64106, HAncock 1-6969

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RESPONDENT'S BRIEF IN OPPOSITION

Petitioner seeks a Writ of Certiorari to the Supreme Court of Kansas to review the decision of that Court affirming her conviction in the District Court of Sedgwick County, Kansas, of First Degree Manslaughter.

OPINIONS BELOW

The opinions of the Supreme Court of the State of Kansas v. Edna Mae Booker are reported in 197 Kan. 13, 415 P. 2d 411, and 200 Kan. 166, 434 P. 2d 801.

JURISDICTION

Petitioner's effort to have this Court accept jurisdiction under 28 U.S.C. 1257 (3) comes too late.

This Court's Rule 22, promulgated under authority of 28 U.S.C. 2101 (d) provides that "A petition for Writ of Certiorari to review the judgment of a State Court of last resort in a criminal case shall be deemed in time when it . . . (is) filed with the clerk within ninety days after entry of such judgment. . . ." The petition herein was not filed within ninety (90) days of such judgment.

The judgment was filed December 9, 1967 (Pet. p. 19), motion for rehearing was filed in the Kansas Supreme Court on December 29, 1967, and denied on January 5, 1968 (Pet. p. 36). Petitioner is simply too late.

For purpose of review in the Federal Supreme Court by Writ of Certiorari, the judgment of a State Court becomes final upon the date of the denial of a petition for rehearing, *Citizens Bank* v. *Opperman*, 249 U.S. 448 (former Comp. Stat., 1916, p. 1207).

This Court has held that where an appeal in a State Court was dismissed as moot on December 4, 1942, and the clerk of the Court from which the appeal was taken filed the decree on January 7, 1943, the time for application to the Federal Supreme Court ran from December 4, 1942, irrespective of local practice, for the entering of the judgment in the Trial Court was nothing but a ministerial act, *Cole* v. *Violette*, 319 U.S. 581.

Moreover, Rule 10(c) of the Kansas Supreme Court provides: "Decisions of the Court will be announced by the filing of the opinions with the Clerk of the Court. . . ." Rule 7(b) provides: "The Clerk shall refrain from issuing

a mandate on a decision of the Court for a period of twenty (20) days after a decision has been announced. . . During said period any party may file a motion for rehearing or for a modification of the decision, and thereupon, unless otherwise ordered by the Court, the issuance of the mandate will be stayed pending the determination of the issues raised by such motion."

Thus, petitioner had ninety days from January 5, 1968, and with computation beginning January 6, the petition should have been on file no later than April 5, 1968. As shown by the records of this Court, the petition was not filed until April 8, 1968, and should not be entertained, in light of the strong public policy requiring a rule limiting the time for seeking a Writ of Certiorari, expressed in the previous decisions of this Court.

QUESTION PRESENTED

In this case, was the Supreme Court of Kansas justified in relying upon the Supreme Court of the United States ruling in *Green* v. *United States*, 335 U.S. 184, and holding that petitioner has not been subjected to double jeopardy when the circumstances were that petitioner was charged with Murder, convicted of Manslaughter, appealed, was granted a new trial because an intent instruction of the Trial Court was there held to be erroneously broad, and the second jury gave the same verdict as the first?

STATUTES INVOLVED

K.S.A. 62-1601 "NEW TRIAL DEFINED; a new trial is a re-examination of the issue in the same Court."

K.S.A. 62-1602 "EFFECT OF GRANTING NEW TRIAL; FORMER VERDICT NOT USED OR REFERRED TO; the granting of a new trial places the parties in the

same position as if no trial had been had; the former verdict cannot be used or referred to either in the evidence or argument."

28 U.S.C. 2101 (d) "An application for appeal or application for a Writ of Certiorari to review a judgment of a State Court in a criminal case shall be as prescribed by rules of the Supreme Court." *U.S. Const., Fifth Amendment, Fourteenth Amendment* (Pet. p. 3).

STATEMENT OF THE CASE

Edna Mae Booker was charged in the District Court of Sedgwick County, Kansas, for the murder of her husband, James Booker, by shooting him with a pistol at 5:00 P.M. on March 8, 1965. The Bookers experienced frequent arguments and considerable dissension during the course of their marriage. On several occasions their arguments progressed from vocal to physical conflict. During a period of approximately one year preceding the final marital conflict, the petitioner was keeping company with a Sergeant in the Air Force stationed in Wichita all unbeknown to her husband. The husband found a motel bill from the Holiday Inn in Kansas City, Missouri and a love note fondly recalling this weekend written by the lover and thus discovered the real events of his wife's then recent "trip to visit her Aunt." This he was attempting to discuss with his wife during a trip to the grocery store and thus away from the presence of the children. The Bookers returned to their home from the grocery store at which time the petitioner went into the bedroom and transferred a pistol from her purse to the pocket of her dress. She returned to the living room and told her husband that she had the pistol. There was struggle during which time the petitioner fired the pistol six times striking her husband four times, two of which pierced vital organs and caused death of the decedent.

The Jurors found her guilty of the offense of First Degree Manslaughter which is a lesser included offense. Her conviction was appealed to the Supreme Court of the State of Kansas, which Court reversed her conviction with directions to the Trial Court to grant her a new trial as of June 11, 1966.

The petitioner was granted a new trial under the laws of the State of Kansas, K.S.A. 62-1601 and K.S.A. 62-1602, for a re-examination of the issue of First Degree Murder in the same Court. Trial began on October 17, 1966, and on October 24, 1966 (not the 23rd day of November, 1967, as set out in petitioner's statement of the case, page 5) the petitioner was again found guilty of the offense of First Degree Manslaughter by a Jury.

Appeal was again taken to the Supreme Court of the State of Kansas, which Court affirmed her second conviction. The Mandate of said Court issued January 5, 1968.

REASONS CERTIORARI SHOULD BE DENIED

1. The petitioner has filed too late.

2. The Kansas Supreme Court was justified in following the decision of the United States Supreme Court in Green v. United States, 355 U.S. 184.

In this case, *State* v. *Booker*, 200 Kan. 166, 434 P. 2d 801 (Pet. p. 34), the Kansas Supreme Court referred to its recent case of *Cox* v. *State*, 197 Kan. 395, 416 P. 2d 741, wherein it had relied upon the *Green* case as follows,

> "In the *Green* case, upon which the Second Circuit relied in deciding *Wilkins*, a distinction was retained as to State reprosecutions. In reconciling its holding in *Green*, with previous holdings, the State reprosecutions were consistent with due process of law

under the Fourteenth Amendment to the Constitution of the United States and that the prohibition of double jeopardy under the Fifth Amendment is not applicable against State action by the force of the Fourteenth Amendment, it was stated in note 15 at pages 194 and 195 of the opinion in *Green*:

> '. . . *Palko* v. *Connecticut*, 302 U.S. 319, *Brantley* v. *Georgia*, 217 U.S. 284, and *Kring* v. *Missouri*, 107 U. S. 221, are not controlling here since they involved trials in State Courts. . . .'" (pp. 400-401).

Petitioner's argument that since Certiorari was denied in *United States (ex rel. Hetenyi)* v. *Wilkins*, 348 F. 2d 844, it has become the law of the land disregards this Court's rule that a refusal to grant Certiorari imports no expression on the merits of the case. "Certiorari denied" means only that Certiorari has been denied.

The question presented to the Court is not whether a part of the Federal Constitution's guarantees have been violated, but whether the Kansas Supreme Court was justified in relying on this Court's holding in *Green*. The instant case does not present facts to support petitioner's proposition of law. She was not prejudiced in any manner in the second trial. She was not convicted of a greater offense in the second trial.

A search of the Kansas Law reveals that from 1871 in *State* v. *McCord*, 8 Kan. (2 ed.) 232, 12 Am. Rep. 469, Kansas has always held that an appeal is a privilege offered by the law to the accused, in addition to the guarantees afforded by the Constitution. The Statutes are salutary and serve a legitimate State interest. Fairness is promoted and an orderly procedure of criminal litigation is preserved. The parties and new trial are placed in the same

position as if no trial had been had, all the testimony must be produced anew at the new trial, and the new trial must stand or fall on its own merits, see *Cox* v. *State*, 197 Kan. 395, 416 P. 2d 741. Such a right, which the State can extend or withhold, on terms and conditions as it deems proper, so long as all are fairly and equally treated finds expression in *Hoag* v. *New Jersey*, 356 U.S. 464,

> ". . . . For it has long been recognized as the very essence of our Federalism that the States should have the widest latitude of their own systems of criminal justice . . ."

and *Mooneyham* v. *Kansas*, 339 F. 2d 209, C.C.A. 10, 1964,

> ". . . It is equally well settled that the right to appeal in criminal cases is not guaranteed by the Federal Constitution. A State, consistent with due process, may provide for an appeal by convicted defendants in criminal cases upon such terms as it deems appropriate."

The decision in the Court below was correct as petitioner has been twice convicted of the same offense for under the facts she is guilty. Allowing the petitioner a second trial only on the lesser offense would be to allow her to produce all of the evidence and deny to the other party the same right. Petitioner would have to be acquitted if she introduced to the jury evidence which would justify a conviction of only the greater crime, as these are separate and distinct crimes, and the jury would be perplexed, to say the least, if confronted with the evidence of intentional and premeditated killing, and instructions which would describe only an offense dealing with careless or accidental killing, the very purpose of the law would be defeated, namely, the resolution of a problem by their fair

and civilized means, according to clearly understood community standards, for without understanding, there can be no respect.

It is clear that Federal proseeutions are governed by rules promulgated by this Court and it is equally clear that each State should have the widest latitude in the administration of its own systems of criminal justice. It is not a violation of the petitioner's rights under the Fifth Amendment to the Constitution of the United States as made operative by the Fourteenth Amendment to the Constitution of the United States for her to have been granted a new trial at her own request. The authority of the States in dealing with crime within their borders does not require identity of procedure, except that no State can deprive particular persons or classes of persons of equal and impartial justice under the law. This right is insured by laws operating on all alike within a State, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private rights and distributive justice. The State of Kansas has granted to persons convicted of crimes the privilege to appeal and secure a new trial. A new trial being a re-examination of the issue is that and nothing less, not some part of the issue that may be ascertained by judicial construction. To sustain petitioner's theory is to place the parties in a very different position than they would have occupied if no trial had been had, and to do this would destroy the fundamental conditions under which new trials are granted to all alike.

Each party to a lawsuit is entitled to one fair trial and each party to a "re-examination of the issue" is entitled to a fair re-examination of that issue, anything less is not Justice.

CONCLUSION

Petitioner is out of time and thus precluded by the Rules of this Court from review herein. The Supreme Court of Kansas was justified in relying upon the decision of this Court in *Green* in affirming petitioner's conviction. Petitioner has failed to establish a question for review by this Court and it is submitted her petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT C. LONDERHOLM,
Attorney General of Kansas,
State House,
Topeka, Kansas,
KEITH SANBORN,
County Attorney of Sedgwick County, Kansas,
Court House,
Wichita, Kansas,
Attorneys for Respondent.

DONALD FOSTER,
Deputy County Attorney of Sedgwick County, Kansas,
Court House,
Wichita, Kansas,
Of Counsel.